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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1571

STATE OF DELAWARE,

Petitioner,

vs.

WILLIAM J. PROUSE, III,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF DELAWARE.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.

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Americans for Effective Law Enforcement, Inc. and the International Association of Chiefs of Police, Inc. respectfully move this court for leave to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The Deputy Attorney General of the State of Delaware has consented to the filing of this brief by Americans for Effective Law Enforcement, Inc. and the International Association of Chiefs of Police, Inc.

The respondent has not responded to our requests for his consent. Accordingly, we are moving this Court directly for leave to file. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

Our interest in this case arises from the nature of the issue involved—whether the police practice of randomly stopping motorists is violative of the United States Constitution. The resolution of this issue will have a direct and material effect on law enforcement in this country. *Amici* believe that this practice is not unconstitutional; random stops of motorists must be conducted by law enforcement officers in order to deter potentially dangerous motorists and to effectively enforce traffic regulations.

ARGUMENT.

I. Introduction.

This case presents a fundamental constitutional question: whether random traffic stops, made by law enforcement officers in order to determine that state drivers licensing and vehicle registration requirements are complied with, are constitutionally permissible.

This Court has reserved judgment on this specific issue. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), this Court held that roving searches for aliens by Border Patrol agents must be based on some articulable suspicion; however, the Court noted that:

> Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers licenses, vehicle registrations, truck weights and similar matters. 422 U.S., at 883 n. 8.[1]

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1. Mr. Justice Rehnquist went even further in his concurring opinion in *United States* v. *Brignoni-Ponce, supra:*

> [A] strong case may be made for those charged with the enforcement of the laws conditioning the right of vehicular use of

(Footnote continued on next page)

The interests of the state in enforcing highway laws are obvious:

1. Seeing that only those qualified to operate motor vehicles are doing so;
2. Making sure that only those vehicles which are properly registered and are in safe operating condition are allowed to be on the highways;
3. Restraining dangerous drivers, such as those who are intoxicated or under the influence of narcotics;[2] and
4. Apprehending those who are driving stolen motor vehicles.[3]

For these reasons many states permit, by statute or court decision, random stops of motor vehicles by law enforcement officers, and this practice has been upheld by a number of courts.[4] Other courts, however, have held that random traffic stops are constitutionally impermissible.[5]

(Footnote continued from preceding page.)

a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications provided by law for such use. [Citations omitted.] I regard these and similar situations, such as agricultural inspections and highway roadblocks to apprehend known fugitives, as not in any way constitutionally suspect by reason of today's decision. 422 U.S., at 887.

2. In a study of highway accidents in six counties in North Carolina, the authors found that 40.3% of those persons who were killed in automobile accidents had alcohol in their blood. Turk, McBay, Hudson and Bullaboy, "Involvement of Alcohol, Carbon Monoxide, and Other Drugs in Traffic Fatalities," in *Alcohol, Drugs and Traffic Safety* 597 (S. Israelstram and S. Lambert ed. 1975). In another study conducted in the Boston area, the authors found that 46% of those persons who were killed in automobile accidents had alcohol in their blood. Sterling-Smith, "Alcohol, Marijuana and Other Drug Patterns Among Operators Involved in Fatal Motor Accidents," in *Alcohol, Drugs, and Traffic Safety* 93, *id.* Both authors indicated that it was difficult to determine the number of alcohol related, non-fatal accidents due to the difficulty of obtaining blood samples from the drivers involved in those accidents.

3. The FBI Uniform Crime Reports noted that in 1977, there were 968,400 motor vehicle thefts in the United States.

4. *United States* v. *Jenkins*, 528 F.2d 713 (10th Cir. 1975); *United States* v. *Lepinski*, 460 F.2d 234 (10th Cir. 1972); *Lipton*

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Most cases in this area arise where the traffic stop escalates into a probable cause situation and an arrest is made for some *other* crime which the officer discovers as a result of the random traffic stop. This is certainly the situation in the instant case; the traffic stop was truly "random." The Supreme Court of Delaware noted that:

> Officer Avena candidly testified that the defendant's car was randomly chosen from other vehicles on the road to be the subject of a license and registration check, and that he regularly made routine stops of motor vehicles when not answering complaints. *State* v. *Prouse*, Del. Supr., 382 A.2d 1359 (1978), at 1361.

It was only *after* the stop that the police officer smelled the marijuana odor and then discovered marijuana in plain view. With regard to the "windfall" nature of the marijuana arrest, the Delaware Supreme Court stated:

> We assume, as all counsel involved herein have, that if the initial detention of defendant was constitutional, all subsequent police acts were also since the marijuana was in the 'plain view' of Officer Avena and as contraband was subject to immediate seizure. *State* v. *Prouse*, *supra*, at 1363 n. 3. (Citations omitted.)

Thus, it is clear that the officer was not using a random traffic stop as a subterfuge to search for narcotics. The issue is, purely and simply, whether the random stop itself was permissible—irrespective of the fact that it led to a narcotics arrest.

(Footnote continued from preceding page.)

v. *United States*, 348 F.2d 591 (9th Cir. 1965); *Myricks* v. *United States*, 370 F.2d 901 (5th Cir. 1967), cert. denied, 386 U.S. 1015 (1967); *State* v. *Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973); *State* v. *Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975); *Leonard* v. *State*, 496 S.W.2d 576 (Tex. Crim. App. 1973); *Palmore* v. *United States*, 290 A.2d 573 (D.C. App. 1972).

5. *United States* v. *Montgomery*, 561 F.2d 875 (D.C. Cir. 1977); *Commonwealth* v. *Swanger*, 453 Pa. 107, 307 A.2d 875 (1973); *People* v. *Ingle*, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975).

It is not our purpose in this brief to reiterate the legal arguments made by the State of Delaware regarding the constitutionality of random traffic stops, although we agree with them and wish to associate ourselves with them. We will confine our arguments herein to two points: the fact that the mere *potential* for abuse should not render an otherwise constitutional police practice invalid and the fact that the power of the police to make random traffic stops has a very necessary and legitimate deterrent effect on potentially dangerous motorists.

II. The Mere Potential for Abuse Should Not Render an Otherwise Constitutional Police Practice Invalid.

The Supreme Court of Delaware predicated its decision in this case squarely on the *potential* for abuse which random traffic stops might entail. It recognized the legitimate state interest in keeping the highways reasonably safe; but, it continued:

> [T]he factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedure. The flaw in the process is that absolute discretion is conferred on the police to detain whomever they desire for whatever reason *on the pretense of a documents check stop. Thus an officer prejudiced against a visibly identifiable group could stop a disproportionate number of persons in the group. No discrimination has been shown in the stop under examination here, but the evil of the possibility* of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures *could* be practical with little or no chance for judicial review. *State* v. *Prouse, supra,* at 1364. (Emphasis supplied.)

Other courts which have held random traffic stops to be constitutionally invalid have expressed similar concerns. For example, the Court of Appeals of the State of New York, in *People* v. *Ingle,* 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975), stated:

> Where the *danger of abuse of discretionary power to intrude upon* personal liberty is greatest, discretion must be limited. 36 N.Y.2d, at 419. (Emphasis supplied.)

We differ with the rationale used by these courts for two reasons. First, on a theoretical level, the argument that, since a given police power *could* be abused, it should therefore be proscribed would, if taken to its logical conclusion, require that we divest law enforcement officers of the power of arrest, and right to search for and seize evidence, as there is tremendous *potential* for abuse of these powers, far more so than in random traffic stop cases.

If we are to have law enforcement in this country we must have law enforcement officers. If these officers are to be able to operate effectively, they must be given certain powers: the power of arrest, the power to make searches and seizures, the right to use force, up to and including deadly force, and the right to "stop and frisk." *Terry* v. *Ohio,* 392 U.S. 1 (1968).

There have, unfortunately, been abuses—sometimes gross and egregious abuses—of these powers. *Screws* v. *United States,* 321 U.S. 91 (1945); *Brown* v. *Mississippi,* 297 U.S. 278 (1936); *Irvine* v. *California,* 347 U.S. 128 (1954); *United States* v. *Price,* 383 U.S. 787 (1966).

No one, however, could seriously argue that, because of such cases, we should strip our law enforcement officers of their power and authority. The authority to make random traffic stops is a *very* minimal intrusion compared with most police powers, and we submit that the *potential* abuse of such authority is no reason to hold it constitutionally impermissible. This is particularly true in the instant case where even the lower court conceded that no discriminatory motive on the part of the police officer was shown.

On a far more practical level, we disagree with the contention that courts would be unable to "police the police" in the random stop area. Certainly the Supreme Court of Nebraska, in its

opinion in *State* v. *Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (Neb. 1975), had no particular qualms or reservations about *its* ability to deal with abusive police conduct:

> We have no hesitancy in saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment. We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some possible crime unrelated to the requirements of section 60-435, R. R. S. 1943. 194 Neb., at 346.

To the same effect, the U. S. Court of Appeals for the Ninth Circuit, which upheld a random traffic stop in *Lipton* v. *United States*, 348 F.2d 591 (9th Cir. 1965), stated:

> This does not mean that a traffic officer might stop an automobile and ask to see the operator's license as a ruse in an intended search for evidence of some possible crime unrelated to possession of a drivers license. (Citation omitted.) 348 F.2d, at 594.

The courts in this country have always kept a sharp eye out for abusive police practices, and there is absolutely no reason to believe that this vigilance will be attenuated in cases involving random traffic stops.

On the contrary, the random traffic stop cases will probably generate a more intense scrutiny of police practices, should evidence of another crime be detected. *United States* v. *Montgomery*, 561 F.2d 875 (D.C. Cir. 1977, but see the opinion of Wilkey, J., dissenting).

In sum, we do not believe that if this Court sanctions the police procedure of random traffic stops, it will lead to wholesale violations of civil rights or civil liberties. To be sure, those few drivers who happen to be unfortunate enough to be stopped at random and are found to be intoxicated, under the influence of or transporting narcotic drugs, driving stolen vehicles, or involved in some other way in criminal activity which the traffic

stop discloses will feel aggrieved. But it is precisely those people against whom the legitimate state interest in random traffic stops is directed.

The innocent driver will show his papers to the officer and go on his way; it is only the guilty—who should not be on the streets and highways in the first place—who have anything to fear from random traffic stops, provided that such stops are conducted properly. We submit that the minimal interference involved is more than justified by the state's interest in such cases. As the courts have stated with regard to random traffic stops:

> The only practical method of enforcing the licensing laws involved is by stopping the vehicle. *State* v. *Holmberg*, 194 Neb. 337, 341 (1975);

and,

> A contrary holding against random stops would render unenforceable the state statute requiring that automobile drivers be licensed. *Lipton* v. *United States*, *supra*, at 593.

If *potential* abuse of a given police practice, which is supported by a legitimate government interest, is raised by the opponents of that practice, we submit that the burden should be on those opponents to document evidence of such potential abuse. This clearly was not done by the Supreme Court of Delaware which conceded that there was no discriminatory motive in the stop of Respondent Prouse's car. (See above, p. 5).

The bald statement that a police procedure *can* be abused should not be equated with *proof* of such abuse. Our point is simply this: we have conceded that *any* police power can be, and, regrettably, has been, abused. We contend that such abuses, however, are the exception rather than the rule; and we vigorously contend that unless abuses—actual or potential—have been proven to an extent that they outweigh the legitimate needs of the state to protect its citizens, this Court should not invalidate demonstrably necessary police procedures.

III. The Power of the Police to Make Random Traffic Stops Has a Very Necessary and Legitimate Deterrent Effect on Potentially Dangerous Motorists.

Our final argument about the legitimacy of random traffic stops will be brief. We argue that logic and common sense dictate that the mere knowledge that the police are constitutionally empowered to make random stops will be a significant deterrent to *some* incapacitated drivers, especially drunks and those under the influence of narcotics.

We cannot cite any statistics on this issue, primarily because (as in capital punishment cases) the party who is arguing for deterrence is in the unenviable position of attempting to prove a negative. That is to say that those who *are* deterred from doing a given act are, by definition, not those who can be entered into the deterrence side of the satistical equation. Being deterred, people do not commit criminal acts, and therefore we can never know their numbers.

Even so, we submit that, in a given number of cases, motorists who are in no condition to drive and know it will refrain from driving because they will anticipate that they *might* be stopped, albeit randomly, and would then suffer the consequences of a "driving while intoxicated" or "driving under the influence" conviction.

As noted, we cannot *prove* this contention. It is somewhat similar to the "lighthouse" analogy of the poet Hyman Barshay, writing in defense of capital punishment:

> The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down.[6]

6. Hyman Barshay, as quoted by Ernest van den Haag, "On Deterrence and the Death Penalty," 60 J. Crim. L. 141 (1969).

We do argue, however, that the potential deterrent to incapacitated motorists, which is inherent in the police authority to make random traffic stops, should be carefully considered by this Court when the constitutionality of the issue is weighed. The corollary is also true; if an incapacitated motorist knows that he is *immune* from a stop, so long as he can "straighten up" sufficiently when he observes a police car, he may be far more willing to take to the road, to the detriment of other motorists.

This point was made by the District of Columbia Court of Appeals, in the context of license and registration stops, in *Palmore* v. *United States*, 290 A.2d 573 (D.C. App. 1972):

> After all, persons who drive in the District without a valid license and registration will not necessarily exhibit conduct or the appearance giving rise to articulable suspicion that they are without proper driving credentials. Thus they would be immune from the 'spot check' to enforce a requirement deemed necessary by Congress for public safety on the District's highways. 290 A.2d, at 582.

When we consider the considerable toll of human lives that drunk drivers take,[7] we believe that the deterrence argument becomes all the more compelling.

7. *Supra* note 2.

CONCLUSION.

The state has a legitimate interest in assuring that its highways are safe. Random traffic stops foster this interest in certain cases. Wholesale abuse of this practice has not been proven, and the mere *potential* for abuse should not invalidate an otherwise legitimate police practice.

For the foregoing reasons, *amici* urge this Court to reverse the judgment of the Supreme Court of the State of Delaware in the instant case.

Respectfully submitted,

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